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In The Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.;
PARKE PROPERTIES I, L.P.; AND
PARKE PROPERTIES II, L.P.,

Petitioners,

v.

GALE A. NORTON, SECRETARY
OF THE INTERIOR, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE AMERICAN FARM BUREAU FEDERATION AND TEXAS FARM BUREAU IN SUPPORT OF PETITIONERS

JULIE ANNA POTTS
General Counsel
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Suite 700
Washington, D.C. 20024
(202) 406-3616

PAUL D. MARABLE III
General Counsel
STEPHANIE MCMULLEN
Assistant General Counsel
TEXAS FARM BUREAU AND AFFILIATED COMPANIES
7420 Fish Pond Road
Waco, Texas 76710
(254) 751-2280

SYDNEY W. FALK, JR.*
SUSAN M. MAXWELL
BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & MCDANIEL, L.L.P.
816 Congress Avenue
Suite 1700
Austin, Texas 78701-2443
(512) 472-8021
(512) 320-5638 Facsimile

Attorneys for Amici Curiae

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

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CONSENTS OF PARTIES TO FILING OF BRIEF BY AMICI CURIAE

The Solicitor General of the United States, representing Respondents, and counsel for Petitioners GDF Realty Investments, Ltd., *et al.*, have consented to the filing of this brief of amici curiae American Farm Bureau Federation and Texas Farm Bureau. The original copies of their written consents accompany this brief.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae American Farm Bureau Federation and Texas Farm Bureau respectfully submit this brief on behalf of their members to advance their members' policy views.[1]

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization formed in 1919. AFBF was founded to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in all fifty states and Puerto Rico, representing more than five million member families.

The Texas Farm Bureau ("TFB") is a Texas non-profit membership corporation committed to the advancement of agriculture and prosperity for rural Texas. TFB has 371,320 members and is associated with independent

[1] Counsel for the American Farm Bureau Federation and the Texas Farm Bureau authored this brief in its entirety; no person or entity other than amici curiae, their members, and their counsel provided any monetary contribution to the preparation or submission of this brief.

county Farm Bureau corporations in 207 different counties across the state, including Travis County, Texas, the situs of the land that is the subject of this appeal.

AFBF and TFB (collectively "Farm Bureau") believe that application of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, to species that are wholly local and noncommercial ("intrastate") in nature is unconstitutional. ESA section 9 enforcement activity, or threatened enforcement activity, by the United States Fish & Wildlife Service ("USFWS") affects private landowners who have the misfortune to have listed species or merely listed species' habitat on their lands. ESA section 7's consultation requirements also have direct effects on federal permitting and funding programs, especially those of the Departments of Agriculture and Interior, that have a direct impact on Farm Bureau members' interests.

The legal precedents of this case likely will affect many of the members of the Farm Bureau, including but not limited to those who are property owners in Travis County, Texas, the location of the land in question in this case, because the Commerce Clause analysis relied on by the Fifth Circuit panel is of more general applicability than just this case. The Farm Bureau is concerned that its members' agricultural use of their land is not disrupted in the manner or to the extent as was Petitioners' use of their land. Such a disruption would be devastating to the lives of farmers and ranchers, who depend on their land to provide their livelihoods and their homes. The Fifth Circuit panel misapplied the standard for determining whether local, noncommercial species affect interstate commerce sufficiently to establish Commerce Clause

authority for Congress to reach such "intrastate" species under the Endangered Species Act.

SUMMARY OF ARGUMENT

The Endangered Species Act ("ESA") proscribes "takes" of species, which may occur by directly harming an individual member of the species or by adversely affecting the species' habitat. The ESA requires consultation with the United States Fish & Wildlife Service ("USFWS") by federal agencies whose programs or other actions might affect a listed species or its habitat, including programs and actions that affect agriculture. In practice, the ESA has been used by USFWS and private litigants to supplant state and local legislative processes concerning land use and resource allocation. The reach of the ESA is pervasive and disruptive enough without expanding that reach beyond the proper bounds of Congress' Commerce Clause power, to include "purely intrastate" – *i.e.*, local, noncommercial, noneconomic – species.

The Fifth Circuit panel's decision in this case incorrectly concluded that, although the six "cave bugs" at issue themselves have no connection to or effect on interstate commerce and are without commercial or economic character, the ESA is constitutional as applied to them because, when takes of them are aggregated with takes of all other listed species, including species having interstate economic character, the whole has a sufficiently economic character to bring all within the reach of the Commerce Clause. This analysis is flawed, because it aggregates species that are unlike in the relevant quality. The Fifth Circuit panel's aggregation analysis is a merely tautological

exercise, and the result is, of course, presupposed as soon as the relevant universe of aggregable objects is determined so expansively. That determination applies aggregation even though its underlying quantitative assumption – that aggregation is of objects sharing like, relevant qualities – is not met. The panel's approach was qualitatively and quantitatively inconsistent with a proper analysis under *Lopez* and *Morrison*.

ARGUMENT

I. INTRODUCTION

In this as-applied constitutional challenge to the Endangered Species Act, the Court has an opportunity further to refine the limits of Congress' Commerce Clause reach that it undertook in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). This case presents a situation where a federal statute that results in significant federal regulation of both public and private activity in the United States, and that in practice imposes intrusive and often disruptive land- and resource-use restrictions on both private and public landowners, is applied to objects of regulation that are wholly local and noneconomic in character, departing from this Court's past jurisprudence.

The "purely intrastate" species at issue in this case – six minute "cave bugs" found underground at a location in

the environs of Austin, Texas[2] – are not traded in interstate commerce, do not affect channels of interstate commerce directly or indirectly, and of themselves do not affect interstate commerce, significantly or otherwise. The panel of the Fifth Circuit Court of Appeals itself recognized that the cave bugs have no substantial effect on interstate commerce. *See GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 637-38 (5th Cir. 2003). It is only by an analytically flawed invocation of the aggregation principle utilized by this Court in *Wickard v. Filburn*, 317 U.S. 111 (1942), that the Fifth Circuit panel upheld the application of the Endangered Species Act to these cave bugs against Petitioners' constitutional challenge.

II. THE ENDANGERED SPECIES ACT IS PERVASIVE AND DISRUPTIVE ENOUGH WITHOUT EXPANDING ITS REACH BEYOND CONSTITUTIONAL BOUNDS

The Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, intrudes on public and private activity in the United States in a variety of ways. Agricultural activities are by definition land-use intensive, and farmers' and ranchers' participation in federal programs is substantial. Farmers and ranchers are therefore more directly affected by the ESA than most. The Farm Bureau

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[2] They are: (i) the Bee Creek Cave harvestman, *texella reddelli*; (ii) the Bone Cave harvestman, *texella reyesi*; (iii) the Tooth Cave pseudoscorpion, *tartarocreagris texana*; (iv) the Tooth Cave spider, *neoleptoneta myopica*; (v) the Tooth Cave ground beetle, *rhadine persephone*; and (vi) the Kretschmarr Cave mold beetle, *texamaurops reddelli*. The first four are arachnids; the two beetles are insects. The largest is approximately 7 mm (about 1/4 inch); the smallest is approximately 1.4 mm (about 1/16 inch). They were listed in September 1988.

is concerned that the ESA not be more broadly applied than the Constitution permits.

The impact of the ESA on farmers and ranchers comes primarily from the Act's proscriptions against "takes" of listed species or federal actions contributing to their "jeopardy." Section 9 of the ESA, 16 U.S.C. § 1538, prohibits "takes" of listed species. Through implementing regulations, a "take" may include adverse effects on a listed species' habitat. *See* 16 U.S.C. § 1533 ("take" defined); 50 C.F.R. § 17.3 ("harm" and "harass" defined). In Texas in 1994, for example, it was a United States Fish & Wildlife Service ("USFWS") practice to send letters advising landowners, many of them farmers and ranchers, that their land contained possible habitat for two listed bird species, and that particular of the landowner's activities there might constitute a take. The so-called "bird letters" interfered directly with land use activities, and often affected owners' ability to obtain financing or permits. *See State of Texas v. Babbitt*, No. W-94-CA-271 (W.D. Tex. 1994) (seeking, among other things, to enjoin bird letters; agreed joint order, USFWS practice ceased).

Similarly, in a series of cases beginning in 1991, the Sierra Club and others filed lawsuits whose goal it was to impose federal limitations on the pumping of water from the Edwards Aquifer in central Texas. Sierra Club's theory was that unregulated pumping adversely affected listed species' riverine habitats by causing diminished flows from natural springs fed by the aquifer, so that section 9 takes occurred. These cases involved years of litigation including the City of San Antonio and other Edwards Aquifer-dependent cities, as well as many private landowners in the area, including farmer and rancher defendants. *See Sierra Club v. San Antonio,* 112 F.3d 789, 792-93 (5th Cir.

1997) (describing actions brought by the Sierra Club regarding the Edwards Aquifer); *Sierra Club v. Glickman*, 156 F.3d 606, 610 (5th Cir. 1998) (same); *see also Sierra Club v. Lujan*, No. MO-91-CA-069, 1993 WL 151353 (W.D. Tex. Feb. 1, 1993); *Sierra Club v. Babbitt*, 995 F.2d 571 (5th Cir. 1993); *Sierra Club v. Babbitt*, 81 F.3d 155 (5th Cir. 1996) (Table) (No. 94-50260); *Sierra Club v. San Antonio*, No. MO-96-CA-097 (W.D. Tex. 1996); *Sierra Club v. San Antonio*, 112 F.3d 789 (5th Cir. 1997) (interlocutory appeal of temporary injunction); *Sierra Club v. San Antonio*, 115 F.3d 311 (5th Cir. 1997) (intervention of State of Texas); *Sierra Club v. Glickman*, 82 F.3d 106 (5th Cir. 1996) (intervention of Farm Bureau and State of Texas).

The federal government funds many programs implicating land use, including many that directly affect agriculture; and also must grant permits for many land-use activities. ESA section 7 requires federal agencies to consult with USFWS before any federal action is taken that might increase the likelihood of "jeopardy" to a listed species, *see* 16 U.S.C. §§ 1531, 1536(a)(2), and provides an additional basis for challenging such programs. The Sierra Club has, for example, sued the Secretary of Agriculture under section 7, challenging production flexibility contract payments to farmers made under the Federal Agriculture Improvement and Reform Act of 1996. *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998).

This case itself provides a signal example of the intrusiveness and disruptiveness of the ESA into ordinary land-use activities, and the unrelenting difficulty a landowner may face in simply trying to use his or her land in an otherwise normal and accepted manner. To have proposed a hypothetical situation with so many egregious elements would have been implausible.

The point here is not to attack individual provisions of the ESA or its administration, or to question whether there should be legislative changes, but to remind the Court that the ESA intrudes broadly on land and resource use; and that it has been, and likely will continue to be, used to provide a federal judicial forum for land-use and anti-development debates that formerly had resort to state and local legislative and regulatory processes.

This Court has long tempered the federal reach in areas of traditional state regulation – including land use regulation and resource management – based on federalism concerns. *E.g.*, *Morrison*, 529 U.S. at 611 (citing *Lopez*, 514 U.S. at 573-74, 577 (Kennedy, J., concurring)); *id.* at 613, 615; *Lopez*, 514 U.S. at 557 (care not to "obliterate the distinction between what is national and what is local"); *id.* at 564. Those same concerns counsel here that application of the ESA should not extend beyond the proper reach of the Commerce Clause.

III. THE FIFTH CIRCUIT PANEL'S AGGREGATION APPROACH AS APPLIED TO "PURELY INTRASTATE" SPECIES WAS ANALYTICALLY FLAWED

The Farm Bureau does not doubt that, where a listed species that is the object of the statute's application has a clear relationship to interstate commerce, Congress may apply the strictures of the ESA. But the Constitution will not tolerate such a regime when the object of the congressional regulation is an entirely local, noncommercial, noneconomic species. The analytical device of aggregating objects of regulation that are, each by itself, insufficiently connected to interstate commerce to support Commerce Clause reach may be constitutionally permissible where

there is some iota of economic character or some finite connection or consequence to interstate commerce in the individual object. But where, as here, these species' connection to interstate commerce is not merely tenuous but wholly lacking, aggregation must fail. *There is nothing to aggregate.*

The concept underlying aggregation is that, although the importance of a single example may be *de minimis*, the sum of all similar *de minimis* examples may nonetheless constitute a significant total. Aggregation thus is an analytical device that may justify Commerce Clause reach where a would-be object of congressional regulation has a connection to interstate commerce that, by itself, is too small, too tenuous, or too remote to justify regulation, but the effect of all objects of like character in the aggregate *is* sufficient to provide that constitutional justification. In *Wickard*, the justification for concluding that Mr. Wickard's home-use wheat was subject to the Agricultural Adjustment Act of 1938 was that the aggregate of all farmers' home-use wheat would, collectively, be an amount potentially sufficient to distort the market and undermine the price regulation scheme Congress had enacted. *Wickard*, 317 U.S. at 128-29 ("That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others *similarly situated*, is far from trivial.") (emphasis added).

In the case of purely intrastate species, however, aggregation with interstate species is inappropriate to provide a constitutional justification, because all the objects of the aggregation do not each share the relevant character. The aggregation principle contemplates that

each object possesses a quantum of the particular quality sought to be aggregated. To assess whether the cumulative sum of *de minimis* effects collectively constitutes a non-*de minimis* whole, the cumulation must be of *like* effects or qualities. *See, e.g.*, *Wickard*, 317 U.S. at 127-28 ("similarly situated"). Apples, though round and of approximately the same size and weight, do not affect the demand for baseballs.

There are two distinct ways in which the Fifth Circuit panel's aggregation analysis failed this basic logical criterion. First, the cave bugs at issue in this case have neither commercial nor economic character, nor any other connection themselves to interstate commerce. Although explicitly recognizing this, the Fifth Circuit panel aggregated them generally with other listed species that *are* "interstate" in character. *See GDF Realty*, 326 F.3d at 640 ("'interdependent web' of all species"). As Petitioner and this Court have pointed out, this Court has not previously aggregated noneconomic activities with economic ones. Petition at 14-16; *Lopez*, 514 U.S. at 559-60; *Morrison*, 529 U.S. at 611, 612.

Second, the cave bugs were aggregated generally with other objects of ESA regulation that are *not of like kind*. In *Wickard*, Mr. Wickard's wheat was aggregated generally with other *wheat* that also had been produced for home consumption. Mr. Wickard's wheat was not aggregated with home-use barley or sorghum, or butter or chickens. It is unclear why cave bugs should be aggregated with, say, red wolves, spotted owls, red-cockaded woodpeckers, grizzly bears or whooping cranes. The indiscriminate, non-quality-specific aggregation employed by the Fifth Circuit panel provides no test at all; it is tautological, and reduces

to a litmus merely requiring a would-be listed species to be alive in order to be subject to congressional power.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001), this Court examined the specific character of the abandoned gravel pits into which the waste agency wished to discharge dredge or fill material, and declined to find that the proposed discharge into pits which had no connection to interstate commerce required a Clean Water Act section 404(a) permit merely because waterfowl protected by the Corps of Engineers' "Migratory Bird Rule" stopped there during their migration. 531 U.S. at 171-72, 174. Similarly, here the focus should be on each particular species in question and its specific character to determine the quality to be aggregated, and not on the character of all other species which the ESA might reach. For the cave bugs, that common quality and character is their "purely intra-state" character – local, noneconomic, noncommercial and not affecting interstate commerce.

The proper question for the Fifth Circuit panel thus should have been, at most, whether aggregation of all takes of "purely intrastate" species produces a non-de minimis effect on interstate commerce.[3] Had the Fifth Circuit panel asked this question instead, it would have reached a different result.

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[3] This question is itself likely too broadly framed. The relevant aggregation might better be based on qualities more specific than "intrastate" character alone. More appropriate aggregation might be of "intrastate" invertebrate subterranean species; or, more consistent with the Act's ecosystem approach, invertebrate subterranean species within the particular ecosystem.

The "like kind" and "economic-noneconomic" errors were *qualitative* deficiencies of the panel's analysis. The panel also failed to constrain its aggregation in order to be consistent with the principle's underlying *quantitative* premise: Individual instances to be aggregated each must have some iota of the quality sought to be aggregated. *Cf. Lopez*, 514 U.S. at 560-61 (statute, having "nothing to do with 'commerce' or any sort of economic enterprise, . . . cannot, therefore, be sustained under our cases upholding regulations of activities, . . . , which viewed in the aggregate, substantially affect[] interstate commerce."); *Morrison*, 529 U.S. at 610, 613 ("Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.").

Unless each object to be aggregated has a quantum of that particular character, however, there is nothing to aggregate. *See Lopez*, 514 U.S. at 567 ("possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce"); *Morrison*, 529 U.S. at 611 n.4, 613. In *Wickard*, each small farmer's quantity of home-use wheat itself had a small but "non-zero" potential to distort the wheat market and defeat the congressional price maintenance program. That was the point: Added together, hundreds or thousands, perhaps millions, of such contributions, each admittedly *de minimis*, nonetheless could constitute a total volume of wheat significant enough to undermine the statutory scheme unless made subject to it. In *Wickard*, the sum of the individual *de minimis* contributions was finite (*i.e.*, non-zero) and significant. *Wickard*, 317 U.S. at 127-28.

Here, however, the cave bugs lack that individual quantitative contribution. As with other "purely intra-state" species, the cave bugs have *no* economic character

whatever. They have *no* connection whatever to interstate commerce, *no* influence on channels of interstate commerce, and *no* effect on interstate commerce. The quantitative contribution of these cave bugs is not merely *de minimis* – it is *zero.* Aggregation cannot sensibly be applied in this situation, because *the sum of zeros is itself zero*. You cannot get something from nothing.

For these reasons, the Fifth Circuit panel's reasoning that, by aggregation with all other listed species, the cave bugs come within the Commerce Clause reach of Congress was inappropriate. The panel's approach provides no discriminant at all. It yields, *ipso facto*, the conclusion that *all* species are within Congress' Commerce Clause reach, without considering their individual specific characters as objects of the activity to be regulated. Were all listed species purely intrastate except one, the panel's analysis would still conclude that all are proper subjects of Commerce Clause regulation under the ESA.

That analysis is, however, fundamentally inconsistent with *Lopez* and *Morrison*, each of which looked to the character of the particular activity to be regulated in determining whether the Commerce Clause justified the regulation. Those cases did not indulge an analysis that credits too-remote "but for" causal connections between the activity to be regulated and interstate commerce. In *Lopez*, this Court rejected the argument that possession of a gun in a school zone may result in violent crime, which in turn might affect the national economy by increasing societal costs (including insurance costs), inhibiting interstate travel, and threatening the educational process, all resulting in a less productive society. 514 U.S. at 563-64;

see also id. at 567 (unwilling to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power"). In *Morrison*, this Court likewise rejected congressional findings in support of portions of the Violence Against Women Act – that gender-motivated violence would deter interstate travel, discourage employment and transaction of business in places in which interstate commerce occurred, diminish national productivity, increase medical costs, and so on – as an attempt to "follow the but-for causal chain . . . to every attenuated effect upon interstate commerce." 529 U.S. at 615.

In this case, the legitimate reach of the ESA to "interstate" species will not be imperiled by denying ESA application to the cave bugs; the ESA was being applied before these cave bugs were discovered, and their omission from its reach now will not prevent continued application of the ESA to interstate species.

The cave bugs thus are not an "essential part" of the ESA. *See Lopez*, 514 U.S. at 561. The Fifth Circuit panel's reasoning in assuming so, *see GDF Realty*, 326 F.3d at 640 ("our analysis of the interdependence of species compels the conclusion that regulated takes under ESA do affect interstate commerce"), artificially appends "intrastate" species, which lack any connection of their own to interstate commerce, to a regulatory scheme that properly reaches only "interstate" species, simply because

these two classes have in common that each comprises living organisms. But this flawed transitivity[4] is the basis of an argument *reductio ad absurdum*. "Intrastate" species do not become "interstate" species because they share some *other* quality with "interstate" species than an economic character or that a "take" would have a direct effect on interstate commerce. Similar reasoning would permit congressional regulation of everything, on the rubric that all things are, after all, made up of atomic and subatomic particles, at least some of which – the ones in trucks and interstate goods, for example – clearly have a substantial effect on interstate commerce.

[4] The transitive reasoning is, in effect: The congressional Commerce Clause power can reach "interstate" species; both "interstate" and "intrastate" species are species; therefore, the Commerce Clause can reach "intrastate" species. *See GDF Realty*, 326 F.3d at 640.

CONCLUSION

The Fifth Circuit panel's application of the aggregation principle to conclude that the cave bugs in this case are within the reach of Congress' Commerce Clause power was inappropriate. The facts of this case concerning the character of the cave bugs are simple, so it provides a good opportunity for this Court to address the manner in which aggregation may be employed. This Court should grant Petitioners' request for a writ of certiorari, in order to consider and instruct on the proper constitutional limits of aggregation as a tool of analysis in Commerce Clause cases.

Respectfully submitted,

JULIE ANNA POTTS
General Counsel
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, S.W.
Suite 700
Washington, D.C. 20024
(202) 406-3616

PAUL D. MARABLE III
General Counsel
STEPHANIE MCMULLEN
Assistant General Counsel
TEXAS FARM BUREAU AND AFFILIATED COMPANIES
7420 Fish Pond Road
Waco, Texas 76710
(254) 751-2280

SYDNEY W. FALK, JR.*
SUSAN M. MAXWELL
BICKERSTAFF, HEATH, SMILEY, POLLAN, KEVER & MCDANIEL, L.L.P.
816 Congress Avenue
Suite 1700
Austin, Texas 78701-2443
(512) 472-8021
(512) 320-5638 Facsimile

Attorneys for Amici Curiae

**Counsel of Record*